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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. LORRAINE CATHLEEN BUSTOS, Defendant and Appellant.	B292616 (Los Angeles County Super. Ct. No. NA108500)

APPEAL from a judgment of the Superior Court of Los Angeles County. Richard M. Goul, Judge. Affirmed in part. Reversed and remanded in part with directions.

Byron C. Lichstein, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, David E. Madeo, Noah P. Hill and Rene

Judkiewicz, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted Lorraine Cathleen Bustos (defendant) of (1) taking or driving a car without the owner's consent, with a prior (Pen. Code, § 666.5),[1] and (2) bringing contraband into a jail (§ 4573). On appeal, defendant argues that the trial court's jury instructions for each crime were incorrect, that the court erred in accepting the jury's verdict after one juror during polling indicated he had initially voted "not guilty," and that the court failed to make necessary findings during sentencing. Defendant is right that the trial court gave incorrect jury instructions for each crime; the instructional error on the contraband count was harmless, but the error on the taking/driving count was not. Defendant's remaining claims are either without merit or moot. Accordingly, we affirm the contraband conviction but vacate the taking/driving a car conviction with instructions for the People to decide whether to retry that count or reduce it to a misdemeanor.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

In February 2018, defendant was pulled over while driving a 2000 Honda Civic. The car had been stolen from its owner many months before, in the summer of 2017. The car's license plate had been swapped out with plates from a different Honda Civic. Defendant was driving the car using a key made for a General Motors car, but which worked in the Civic because the tumblers in its "ignition switch" had likely worn down.

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1 All further statutory references are to the Penal Code unless otherwise indicated.

Following her arrest for driving a stolen vehicle, defendant was driven to jail. Upon arrival, the arresting officer asked defendant if she had any illegal narcotics or weapons on her; she said "no." Posted on the jailhouse walls were signs prohibiting persons from bringing narcotics into the jail. A female jailer found two small baggies containing methamphetamine in defendant's bra during a pat down search, although defendant may have told the jailer about those baggies prior to the pat down. The jailer then conducted a strip search, and found a third baggie containing heroin in a baggie wrapped in toilet paper between defendant's butt cheeks. Defendant never mentioned that baggie. The drugs were in a useable amount.

II. Procedural Background

A. *Charges*

The People charged defendant with (1) "driving or taking a vehicle without consent with a prior" (§ 666.5), and (2) bringing contraband into the jail (§ 4573, subd. (a)). The People alleged defendant's 2002 felony driving or taking a vehicle conviction as the "prior" and alleged her 2016 robbery conviction (§ 211) as a prior "strike" within the meaning of our state's Three Strikes Law (§§ 667, subds. (b)-(j), 1170.12, subds. (a)-(d)).

B. *Jury instructions*

As to the taking/driving a vehicle count, the trial court instructed the jury that defendant could be found guilty if she "took or drove someone else's vehicle without the owner's consent" and did so with the "inten[t] to deprive the owner of possession or ownership of the vehicle for any period of time." As to the bringing count, the court instructed the jury that defendant could be found guilty if she "unlawfully possessed a controlled substance in a penal institution" while knowing of the

substance's presence and nature. The court did not instruct the jury regarding defendant's prior taking/driving conviction because defendant had admitted that allegation prior to trial.

C. *Argument*

In her opening statement, the prosecutor argued that defendant was "charged with driving a car without the owner's consent," not "with actually stealing the car." In her closing argument, the prosecutor re-emphasized that defendant was "not charged with stealing the car." In so arguing, the prosecutor highlighted that the car was "a stolen car. In rebuttal, however, the prosecutor argued more broadly: "People who steal cars like to hide the fact they are stolen, and that's why there is a different license plate on the car. And obviously, people who steal cars, they have to find a way to be able to drive the car."

D. *Verdicts*

The jury returned guilty verdicts as to the crimes of "driving or taking a vehicle without consent" and "bringing contraband into the jail."

E. *Post-trial admission and sentencing*

After defendant admitted her prior strike conviction, the trial court sentenced defendant to eight years in jail. The court imposed a six-year sentence on the taking/driving with a prior count, comprised of a mid-term, three-year base term, doubled due to the prior strike. The court then imposed a consecutive two-year sentence on the contraband count, compromised of a base term of one year (one-third of the mid-term, three year sentence), doubled due to the prior strike. The court did not specifically state why it ran the two counts consecutively, although it more generally set forth several aggravating factors—including defendant's prior 13 convictions (eight for felonies, five

for misdemeanors), the fact she was on probation for robbery when she committed the instant offenses, the "severe[] impact[]" her crime had on the victim who lost his transportation, and defendant's "refus[al] to help herself or to conform to the law and the norms of society."

E. *Appeal*

Defendant filed this timely appeal.

DISCUSSION

I. Instructional Errors

We independently review claims of instructional error. (*People v. Guiuan* (1998) 18 Cal.4th 558, 569-570.)

A. *Taking/driving instruction*

The trial court's taking/driving instruction was legally incorrect. Vehicle Code section 10851 (or section 666.5, when the felony version of this crime is committed repeatedly) sets forth two distinct crimes—namely, (1) the crime of *taking* a vehicle without the owner's consent, and (2) the crime of *driving* a vehicle without the owner's consent. (*People v. Garza* (2005) 35 Cal.4th 866, 876.) The first is a "theft" crime and, as such, is a felony only if the value of the vehicle exceeds $950. (*People v. Page* (2017) 3 Cal.5th 1175, 1182-1183 (*Page*); see § 490.2, subd. (a).) The second is not a "theft" crime; as such, it does not require any showing of value. (*People v. Lara* (2019) 6 Cal.5th 1128, 1136-1137 (*Lara*).) The jury instruction in this case set forth both types of crimes, but did not include any "in excess of $950" requirement. As to the taking crime, this was error. (*Page*, at pp. 1182-1183.)

The instruction therefore presented the jury with one legally invalid theory (that is, the taking charge without the value element) and one legally valid theory (that is, the driving

charge). (*People v. Gutierrez* (2018) 20 Cal.App.5th 847, 857 (*Gutierrez*).) This type of error mandates reversal unless we can conclude "beyond a reasonable doubt that the jury based its verdict on the legally valid theory." (*People v. Chiu* (2014) 59 Cal.4th 155, 167 (*Chiu*); *People v. Chun* (2009) 45 Cal.4th 1172, 1205.) We can reach this conclusion only when the conduct of the trial—including the jury instructions, the verdict forms, and evidence presented—"compel the conclusion that the jury must have relied" upon the legally valid theory. (*In re Martinez* (2017) 3 Cal.5th 1216, 1226.)

Although we think it very likely that the jury's verdict rested on the legally valid driving theory, the trial record does not *compel* this conclusion. To be sure, the evidence focused on defendant's act of driving the Civic in February 2018 several months after its theft and the prosecutor argued in her opening statement and initial closing argument that she was relying solely on the driving theory. But defendant's act of driving also constitutes evidence of a prior taking, as the prosecutor seemed to suggest in her rebuttal argument when she argued that "[p]eople who steal cars like to hide" that fact by using a "different license plate" and non-standard keys. Further, the court instructed the jury on *both* the driving and the taking theories (including going so far as to define when a "taking" occurs) and the verdict form invited the jury to convict on both theories. For these reasons, we cannot conclude beyond a reasonable doubt that all 12 jurors actually based their verdict on the legally valid driving theory. (Accord, *Gutierrez*, *supra*, 20 Cal.App.5th at pp. 851-857 [reversing conviction when jury instructions and verdict form presented both Vehicle Code section 10851 theories]; cf. *Lara*, *supra*, 6 Cal.5th at pp. 1136-1138

[upholding conviction when jury instructions and verdict form were limited to driving theory]; see generally *People v. Melhado* (1998) 60 Cal.App.4th 1529, 1539 [error is harmless only if "each of the 12 jurors agreed unanimously" on the same theory].)

Accordingly, we reverse defendant's conviction under section 666.5 and "remand the matter to allow the People either to accept [a] reduction of the conviction to a misdemeanor [conviction for taking a vehicle worth $950 or less under Vehicle Code section 10851] or to retry the offense as a felony with appropriate instructions." (*Gutierrez*, *supra*, 20 Cal.App.5th at p. 857; see *Chiu*, *supra*, 59 Cal.4th at p. 168; see generally *People v. Navarro* (2007) 40 Cal.4th 668, 678 [under § 1260, "an appellate court may modify a verdict to reflect a conviction of a lesser included offense where insufficient evidence supports the conviction on the greater offense"].) Given this disposition, we have no occasion to address defendant's further arguments that (1) upholding the section 666.5 conviction on a driving theory is invalid absent a finding that the car was worth more than $950,[2] and (2) the trial court erred in not spelling out its reasons for running the section 666.5 and contraband sentences consecutively.

B. *Contraband instruction*

The trial court's instruction on the contraband count was also legally incorrect. Among other things, section 4573 makes it a crime to "knowingly *bring*[]" "any controlled substance" into a

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[2] We note that *Lara* seems to reject this argument as a textual matter (*Lara*, *supra*, 6 Cal.5th at pp. 1136-1137), but that our Supreme Court has yet to address whether its textual construction is absurd or violates equal protection, which is the issue presented in *People v. Bullard*, No. S239488.

"county, city and county, or city jail." (§ 4573, subd. (a), italics added.) The jury instruction, however, required the jury to find that defendant knowingly "*possessed* a controlled substance" in the jail. As a result, the instruction given to the jury omitted the element of "bringing."

It is well settled, however, that a court's failure to instruct the jury on an element of the crime is harmless beyond a reasonable doubt if the omitted element is "uncontested" and supported by "overwhelming evidence." (*People v. Merritt* (2017) 2 Cal.5th 819, 821-822, 830-832; *Neder v. United States* (1999) 527 U.S. 1, 17-18.) Here, the evidence that defendant knowingly brought into the jail the heroin secreted in her buttocks was overwhelming: She at most disclosed methamphetamine in her bra and said nothing about the heroin in her buttocks. A defendant is guilty of bringing drugs into a jail if she is arrested and "drugs are secreted on [her] person." (*People v. Low* (2010) 49 Cal.4th 372, 383.) The "bringing" element was also uncontested: Defendant argued that she was given no opportunity to tell the officer or jailer about the drugs on her person, but this argument is irreconcilable with the evidence at trial and does not in any event contest the fact that defendant entered the jail with heroin secreted on her person.

II. Jury Polling

A. *Pertinent facts*

After the jury returned its verdicts, the trial court polled the jury. During the polling, the court had the following exchange with Juror No. 5:

"THE COURT: Juror 5, are these your verdicts?

"[JUROR No. 5]: Well, actually we had deliberations. I first voted not guilty but - -

"THE COURT: Do you need to go back and deliberate more?

"[JUROR No. 5]: No. No.

"THE COURT: Okay. I need to know right now. The verdicts we just read were 'guilty' to both counts as charged. Are those your verdicts?

"[JUROR No. 5]: I guess, yeah.

"THE COURT: Pardon me?

"[JUROR No. 5]: Yes.

"THE COURT: Thank you."

B. *Analysis*

A jury verdict in a criminal case is valid only if all 12 jurors unanimously but independently conclude that the defendant is guilty. (Cal. Const., art. I, § 16; *People v. Bailey* (2018) 27 Cal.App.5th 376, 382.) To ensure that the written verdict form "represents the 'true verdict'" (*People v. Thorton* (1984) 155 Cal.App.3d 845, 859), a criminal defendant may ask the court to poll the jurors by "ask[ing] [them] whether [the written verdict] is their verdict" (§ 1163). "[I]f any one [juror] answer[s] in the negative," the court *must* send the jury back for further deliberations and, when so doing, may not instruct the dissenting juror(s) to reconsider their views in light of the majority's vote. (§ 1163; *People v. Gainer* (1977) 19 Cal.3d 835, 848-851, overruled on a different point in *People v. Valdez* (2012) 55 Cal.4th 82, 163.)

However, "not every expression of uncertainty during polling requires that recordation of the verdict be withheld while the jury is sent back for further deliberations." (*Chipman v. Superior Court* (1982) 131 Cal.App.3d 263, 267.) Instead, the court must "determine the [juror's] state of mind" vis-à-vis the verdict by looking to the juror's statements and demeanor.

(*People v. Superior Court* (1967) 67 Cal.2d 929, 933.) We review such a determination for an abuse of discretion. (*Ibid.*)

In this case, the trial court did not abuse its discretion in concluding that Juror No. 5 abandoned his or her initial equivocation and ultimately affirmed the verdict. Where, as here, "a juror at first answers evasively or in the negative, if he [or she] finally acquiesces in the verdict, it must be sustained." (*People v. Burnett* (1962) 204 Cal.App.2d 453, 458.) That is because "her positive answer" renders her "preliminary remark" unimportant. (*Ibid.*) Thus, Juror No. 5's initial revelation that he or she initially voted not guilty was eclipsed by his or her subsequent affirmation of the written verdict. And, contrary to what defendant urges, the fact that Juror No. 5 initially held a different view does not by itself mean that the juror was coerced into changing his or her mind; jurors are allowed—and, indeed, encouraged—to change their minds after evaluating the evidence and deliberating with their fellow jurors.

Defendant argues that the trial court erred because it did not, upon hearing Juror No. 5's answers, repeat the jury instructions it had previously given regarding each juror's duty to decide the case for himself or herself. We reject this argument for two reasons. First, defendant has forfeited this argument by not requesting re-instruction at that time. Errors in polling procedures are forfeited if not raised at a time when the trial court can correct them. (*People v. Anzalone* (2013) 56 Cal.4th 545, 264-266; *Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 250.) Second, the argument is without merit in any event. Defendant insists that she is *not* saying that the court should have sent the jury back for further deliberation, but there would be no reason to remind Juror No. 5 of her right to disagree if the

juror were not to then exercise that right during further deliberations. More to the point, it was the court's job to assess Juror No. 5's words and demeanor in evaluating whether he or she was disavowing or adopting the jury's written verdict. The presence or absence of re-instruction does not undercut the court's reasonable determination that Juror No. 5 was adopting the jury's verdict, thereby obviating any need for further deliberation *or* instruction.

DISPOSITION

The judgment is affirmed in part and reversed and remanded in part with directions. The conviction on count 2 (the contraband count) is affirmed. The conviction on count 1 (the section 666.5 count) is reversed. The matter is remanded to allow the People to elect whether to accept a conviction for a misdemeanor violation of Vehicle Code section 10851 or to retry the section 666.5 count. If People elect the former, the court may resentence defendant up to, but no greater than, the aggregated eight-year sentence previously imposed. (*People v. Begnaud* (1991) 235 Cal.App.3d 1548, 1557.)

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_____, J.
HOFFSTADT

We concur:

_____, Acting P.J.
ASHMANN-GERST

_____, J.
CHAVEZ